

No. 11873

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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HAZEL EDNA LEWIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Brief of Appellant

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UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT  
OF WASHINGTON, SOUTHERN DIVISION

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STATEMENT OF PLEADINGS AND FACTS

Appellant was found guilty under counts I, V and VIII of the indictment. The language of each count is indetical except for the date and place of the charge and the name of the doctor who executed the alleged document. The language of Count I is as follows:

“On or about December 5, 1946, at Longview, Washington, HAZEL EDNA LEWIS procured to be falsely and fraudulently executed by Dr. J. A. Nelson a certain document required by the provisions of the Internal Revenue Laws and

Regulations made in pursuance thereof, to-wit, a physician's prescription for narcotics. That said prescription was falsely executed in that it contained a false and fictitious address of the patient named therein.

All in violation of 26 USC 3793."

Attempting to trace the law upon which the counts are based appellant turns first to the Internal Revenue Code and notes that USCA, Title 26, section 2550, imposes a tax per ounce on certain narcotics to be paid by the importer, manufacturer, producer or compounder.

Section 3793, entitled Penalties and Forfeitures, applies generally to all the tax levying provisions of the Internal Revenue Code, including income, estate and gift taxes and about twenty-five other kinds of tax on activities and commodities. Therefore section 3793 is in aid of the ascertainment, and collection of many taxes including a tax on narcotics. It hasn't anything to do with the prevention of use of narcotics or punishment for addiction to the use of narcotics.

The provisions of section 3793, insofar as applicable to the charges in said counts, are as follows:

"Every person who simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the Internal Revenue laws, or by any regulation made in pursuance thereof; or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; shall be imprisoned for a term not less than one year nor more than five years.

The term 'person' as used in this subsection includes an officer or employee of a corporation or a member or employee of a partnership who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs."

Next appellant notes that in reference to above section 2550, there is a section 2559 in part, as follows:

"The Secretary shall make, prescribe, and publish all needful rules and regulations for carrying the provisions of this subchapter . . . into effect."

And appellant notes that section 2606 authorizes the Secretary to confer or impose upon the Commissioner of Narcotics his powers, etc., under the above section 2559.

And appellant notes that United States Treasury Department, Bureau of Narcotics, Regulations No. 5, effective June 1, 1938, provides in part, as follows:

"ART. 168. Manner of execution—Practitioners. All prescriptions for drugs and preparations shall be dated as of and signed on the day when issued and shall bear the full name and address of the patient . . ."

Appellant is not sure that she has surmised the provisions or all the provisions upon which appellee relies, and must await appellee's response. The writer of this brief took no part in the trial and was unfamiliar with this case until thereafter.

### STATEMENT OF POINTS

That no count of the Indictment under which the



defendant was convicted charges an offense punishable by law.

## ARGUMENT

### First

The above statutory provision regarding who is included under the term "person," specifies a class of agents or servants of those executing or signing any bond, permit, entry or other document. The plain inference is that only principals or their agents or servants are subject to the penalties of the section. The appellant was neither an executing nor signing principal or an agent or servant.

### Second

From the above it will be noted that the law as enacted by Congress contains no requirement that a prescription bear the address of the person to whom issued. The requirement in that regard is an entirely new element added by regulations issued under authority of the Secretary, under which the appellant is convicted as a felon. Appellant submits that she cannot be convicted under a regulation, making something criminal which is not criminal under the act. *U. S. vs. Caton*, 12 S. Ct. 764, 144 U. S. 677, 36 L. Ed. 591.

### Third

26 U.S.C., Sec. 2554 provides in part, as follows:

"It shall be unlawful for any person to sell, barter, exchange or give away any of the drugs mentioned in section 2553 (a), except in pursuance of a written order of the person to whom such



article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

“Nothing contained in this section . . . shall apply—

“1. (Use of drugs in professional practice.)

“2. Prescriptions. To the sale, disbursing, or distribution of any of the drugs mentioned in section 2550 (a) by a dealer to a consumer under and in pursuance of a written prescription issued by a physician . . . Provided, however, that such prescription shall be dated as of the day on which signed and shall be signed by the physician . . .”

The above provision regarding “Prescriptions” contains no requirement that it carry any address of the person to whom issued.

In the text of the act which follows above notation “1. (Use of Drugs in professional practice)” there is a requirement that the physician keep a record of the address of the patient. This makes the omission of such requirement from the provisions regarding “Prescriptions” doubly significant.

#### Fourth

In *United States vs. Peppa*, 13 Federal Supplement 669, it is held that one who raised the amount on an order form for narcotics did not simulate same under penal provisions of Section 3793; and that simulation has to be of the entire order form. In the case at bar the appellant is charged with procuring execution of a document false and fraudulent in one particular, namely her address. The prescription was otherwise

valid and proper. If Peppa was not guilty, appellant should not be held guilty.

That case also holds at Pg. 671, as follows:

“Penal statutes are to be construed narrowly. In applying this principle we are required to adopt that sense of the words which best harmonizes with the context and the end to be achieved by the legislation.” (Citing cases.)

“A study of the section under which the indictment was drawn indicates that it was the object to punish the simulation, execution, or signing of certain instruments. Evidently it did not intend that the mere alteration of any such instrument should constitute an offense.”

Accordingly under the act, not added to by regulations, the appellant would not be guilty, as she did not procure the execution of a document entirely false and fraudulent. In fact the prescription was a valid one.

If appellant had changed a right address on the prescription to a wrong address she would not be guilty. It seems to be straining the law to say she is guilty for giving the wrong address in the first place.

#### Fifth

In the counts the appellee charges that appellant procured to be falsely and fraudulently executed a document, to-wit: a physician's prescription.

A prescription is a written medical recipe. *Mayer vs. State*, 42 A. 63, N. J. L. 35.

A prescription is the mere formula for the prepara-

tion of a drugs and medicine. *People vs. Cohen*, 157 N.Y.S. 591.

Prescription as defined by Webster is a direction of a remedy or of remedies for a disease, and the manner of using them. A medical recipe; also a prescribed remedy. *State vs. Bluefield Drug Co.* 27 S. E. 350, 43 W. Va. 144.

### CONCLUSIONS

No addiction to the use of drugs is involved here. Anyone of us obtaining a first prescription from a physician could be convicted of a felony for giving a wrong address if this prosecution is right.

No obtaining of narcotics from an illegal source is involved here.

The law is supposed to be sufficiently clear and certain to enable a citizen to tell when he is violating it. And ordinarily a department head cannot make something criminal which the legislative body has not made a crime. And the law should not be used as a means of entrapment and strained to cover a technical violation foreign to its purpose.

Appellant respectfully submits that the judgment and sentence herein should be set aside, with prejudice, and the case ordered dismissed.

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